The History of State Action in the Environmental Realm: A Presumption Against Preemption in Climate Change Law?

VICTOR FLATT*

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* Tom and Elizabeth Taft Distinguished Professor of Environmental Law, and Director of the Center for Law, Environment, Adaptation, and Resources (CLEAR) at the University of North Carolina Chapel Hill School of Law and Distinguished Scholar of Carbon Markets and Carbon Trading at the Global Energy Management Institute of the Bauer College of Business at the University of Houston. I would like to thank Lesley McAllister and Alice Kaswan for their assistance with ideas in the piece and to the editors of the new Climate and Energy Journal at the University of San Diego for their good work in hosting the symposium and in editing the articles.

I. INTRODUCTION

As we move towards an almost certain comprehensive federal law to address climate change,[1] increasing attention is being paid to what will happen to state and local climate change and climate change-related programs that have arisen in this country in the last few years.[2] As the symposium demonstrated, California has a particular concern that federal law might block its environmental and climate change policies.

The debate has generally been fought between businesses that favor preemption and environmental interests that prefer no preemption.[3] At a recent federal hearing on the Waxman-Markey draft bill (April 2009), the U.S. Chamber of Commerce argued for a full state preemption provision while the National Association of Clean Air Agencies argued to eliminate any preemption language in the bill.[4] According to William Kovacs, U.S. Chamber of Commerce's vice president for environment, technology, and regulatory affairs:

> Compliance with the federal cap-and-trade program set by [the draft legislation] will undoubtedly be very complicated for businesses, who will be forced to comply with hundreds of new regulations and mandates. To tack on a state program, or a regional program, or both, is to make an already cumbersome cost of compliance tantamount to an incentive to relocate a business to another state, or, worse yet, another country.[5]

Conversely, Bill Becker of the National Association of Clean Air Agencies explained that retaining states' rights to regulate was important. Becker stated, "[I]f the bill is weakened as it moves through the legislative process, and yet [if the preemption of states] remains, states would be required to surrender their successful programs and revenue in exchange for an inferior federal program."[6]

Both sides can find support in prior environmental law. Most current environmental control regimes explicitly allow states to go above federal health-based environmental standards, if they choose, in the air, water,

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1. Victor B. Flatt, *Federal Climate Change Legislation-The Perspective From 2008*, 3 ENVTL. & ENERGY L. & POL'Y J. 195, 195 (2008).

2. *See* William Andreen, *Federal Climate Change Legislation and Preemption*, 3 ENVTL. & ENERGY L. & POL'Y J. 261 (2008); Ann Carlson, *Energy Efficiency and Federalism*, 107 MICH. L. REV. FIRST IMPRESSIONS 63 (2008); Robert Glicksman & Richard Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Climate Change*, 102 Nw. U. L. Rev. 579, 580 (2008).

3. Andreen, *supra* note 2, at 267-68.

4. Robin Bravender, *Enviros, States Caution Against Preemption Language in Waxman-Markey Bill*, E&E DAILY, Apr. 27, 2009, http://www.eenews.net/EEDaily/2009/04/27/8/ (on file with author).

5. *Id.*

6. *Id.*

and hazardous waste arenas.[7] However, the restriction on state deviation from federal car-manufacturing standards is one notable exception to states' ability to require stringent standards above federal requirements; California is the lone exception.[8]

One possible way to understand this historic distinction is to separate product and production standards from other health and safety standards. Professor Ann Carlson has suggested that "[e]ven proponents of a strong state role in environmental policymaking advocate federal preemption for the regulation of products for which there is a national market."[9] If business arguments to promote preemption consist of product or production arguments, then these may be re-characterized as solely "product pre-emption" arguments. Similarly, environmentalist arguments that claim that refusing to preempt state environmental laws does not cause inefficiencies or harm might be criticized as having ignored circumstances that deal with products.

Under this reasoning, product-based standards should generally be uniform while other health and safety standards could be subjected to more stringent state regulation. This, of course, fits with the general breakdown of power between the states and the federal government, in that the federal government is given exclusive jurisdiction over interstate commerce (to the benefit of all),[10] but state and local governments are generally seen as better able to operate to protect health and safety interests through the exercise of localized police power.[11]

Much understanding can be gained by examining the basis behind this distinction in federalism history. For instance, the framers recognized a dichotomy between economic protectionism, which should be avoided for the benefit of all, and the states' exercise of legitimate interests in protecting its citizens.[12] Similarly, policies governing modern international trade recognize a similar separation; the trade policies generally prohibit

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7. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7416 (2009); Clean Water Act, 33 U.S.C. § 1370 (2009); Resource Conservation and Recovery Act, 42 U.S.C. § 6929 (2009).

8. 42 U.S.C. § 7543.

9. Ann Carlson, *Energy Efficiency and Federalism*, 107 MICH. L. REV. FIRST IMPRESSIONS 63, 67 (2008).

10. U.S. CONST. art. I, § 8, cl. 3.

11. *See* United States v. Lopez, 514 U.S. 549, 565-67 (1995) (noting that the federal government does not have "general police powers" such as the states do); *see also* Alexandra Klass, *State Innovations and Preemption: Lessons from State Climate Change Efforts*, 41 LOY. L.A. L. REV. 1653, 1666 (2009).

12. Steven M. Simpson, *Judicial Abdication and Rise of Special Interests*, 6 CHAP. L. REV. 173, 205 (2003).

laws that favor one market or business interest over another but allow such when their primary purpose amounts to protecting the health and well-being of a country's citizens.[13]

However, this does not provide a simple solution to the question of which state and local climate change policies should be preempted. First, is this dichotomy actually correct? In her comment, Professor Carlson notes that empirical evidence suggests that separate state product standards may not be problematic.[14] Even if the distinction between product and health and safety is valid, where do various climate change policies fall on this spectrum? Are cap-and-trade schemes more like a product, meaning that it should be uniform, or more like a local health and safety requirement, meaning that a state should be allowed to tailor requirements to meet its own needs?

Luckily, we can examine climate-change preemption outside of theory. In most areas, almost 40 years of environmental federalism has allowed states to regulate beyond the federal government for the protection of their citizens, and we can examine this history empirically in order to determine whether and in which circumstances preemption is necessary. In particular, we can observe when states have exercised their authority to go beyond federal-government protections and how this affects the well-being (economically and environmentally) of the country as a whole. We can then analogize these to climate-change policies that currently exist and are subject to the preemption debate.[15]

II. UNDERSTANDING THE ARGUMENTS FOR AND AGAINST PREEMPTION

Professors Robert Glicksman and Richard Levy recently proposed a framework for viewing preemption in an environmental context, which tracks some of the theoretical reasons for and against preemption, as noted above. According to Glicksman and Levy, preemption should be viewed as a means of understanding the allocation of power between the federal and state governments.[16] Given this premise, they argue that federal preemption displacing states' authority is justified only by a particularized reason, such as an economic or federalism interest.[17] If no

13. Andrew Green & Tracy Epps, *Is There a Role for Trade Measures in Addressing Climate Change?*, 15 U.C. DAVIS J. INT'L L. & POL'Y 1, 8 (2008).

14. Carlson, *supra* note 9, at 67.

15. Professor Klass's article on how the dynamics of federalism should be influenced by state action is also an interesting way to approach the "dynamic federalism" which encompasses environmental laws. Klass, *supra* note 11, at 1655-57. However, I am limiting my review of past environmental laws to traditional notions of explicit federalism.

16. Glicksman & Levy, *supra* note 2, at 580 (2008).

17. *Id.* at 589.

purpose is served by the preemption, then displacing sovereign state power is uncalled for.[18]

The federal government should preempt state action, in Glicksman and Levy's view, when the federal government proposes to address "collective action problems"—that is, problems that arise when state policymakers have perverse incentives to regulate, which is brought on when regulatory benefits accrue for their constituents but regulatory costs spread among citizens outside of their jurisdiction.[19] Unfettered, such behavior would result in a state economic competition in which all states would create policies that initially might benefit their own citizens but, in the aggregate, hurt everyone[20]—a "commons" problem.[21]

In the environmental context, Glicksman and Levy note that preemption in the environmental arena would, thus, be justified if and when "collective action problems create incentives for states to act individually to regulate in ways that are contrary to the interests of the states as a collective."[22] According to their analysis, this justification substantiates the floor preemption common to most environmental laws, and it would permit states to regulate above federal floors if the state feels that such regulation is necessary. The justification also validates preemption of some state Not-In-My-Back-Yard (NIMBY) policies, which would restrict locations of environmental negatives when the benefits are important to everyone.[23]

Though Glicksman and Levy rightfully criticize the abuses of cost-benefit application, their analysis can be summarized as favoring federal preemption if it is necessary to promote better, more cost-efficient outcomes for the entire country.[24] If efficient outcomes exist overall without federal preemption, then preemption should be avoided. Though not everything can be reduced to dollars and cents in determining what

18. *Id.* at 585, 88.
19. *Id.* at 592-93.
20. Glicksman and Levy refer to this as the basis behind the *McCulloch v. Maryland* decision, quoting Chief Justice Marshall. *Id.* at 592 n.64.
21. A "commons" problem occurs when persons have unfettered access to a commons resource and so deplete the resource faster than it could be sustained. Everyone is ultimately better off with a sustained resource, but since no one has the legal right to bar others from the "commons," everyone has an incentive to use as much as quickly as possible. *See generally* Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), *available at* http://www.sciencemag.org/cgi/content/full/162/3859/1243.
22. Glicksman & Levy, *supra* note 2, at 593.
23. *Id.* at 593-94.
24. *Id.* at 602-03, 608-10.

constitutes efficiency, one can examine costs on individuals, businesses, and the government, which may both generally result in shared nationwide burdens to the public as well as lie entirely within a single state's boundaries. Under this rubric, costs borne by everyone should be avoided if they are imposed for the sole benefit of the citizens of one state.

Using this framework, we can analyze the operation of prior federal environmental laws, which generally preempt states from lessening environmental regulation but permit states to regulate more strictly if they choose. In so doing, we can empirically observe when states utilize their power to exceed uniform federal regulation and where the costs and benefits of that exercise fall. On one hand, if it appears that states utilize this power in a way that implies a collective action problem, then that may signify that our historic approach to federalism in environmental laws is not justified and, similarly, that climate change bills should be more aggressive in preempting state policies that might conflict with a uniform federal standard. On the other hand, if the exercise of state regulatory prerogatives point to legitimate state interests that do not generally impose disproportionate external costs, then such a framework is by and large successful and could be applied to the climate change context to see where and on whom climate change regulatory burdens would likely fall.

III. GOING BEYOND FEDERAL STANDARDS UNDER THE CLEAN AIR ACT (CAA)

The Clean Air Act contains an explicit savings clause that preserves state laws and common law with respect to general clean air protection (with the exception of regulation of mobile sources) if these laws reach beyond federal minimum regulations.[25] Moreover, the very structure of the Clean Air Act's enforcement of National Ambient Air Quality Standards (NAAQS) provides states with almost complete flexibility in determining how they will meet this standard within their own borders.[26]

There are two important exceptions to this non-preemption in the CAA. One, the federal government may not approve a state implementation plan if it has a significant detrimental impact on another state's ability to

25. Clean Air Act, 42 U.S.C. § 7416 (2009) ("Except as otherwise provided in [sections preempting certain state regulation of moving sources] nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . ").

26. *Id.* at § 7410.

meet the NAAQS.[27] Two, the federal government may preempt states relative to mobile sources, but even this "exception" contains a significant provision that allows California to adopt a more stringent mobile-source standard; furthermore, other states may choose between the federal and California standards.[28]

Therefore, in general, the Clean Air Act does not preempt state clean air standards and controls, even when state regulations extend beyond federal standards. The Act does not preempt even were each state to choose a different standard for an otherwise similar source. So how have the states exercised their ability to go beyond federal standards? Have they utilized them frequently? If so, have they done so in a "negative" way, that is, in a way that favors their own citizenry at the expense of businesses, government, and consumers nationwide?

Interestingly, despite states' ability to regulate beyond federal standards, with respect to criteria pollutants, they have chosen not to do so. In fact, the opposite is the case. It is federal law that has pushed states to meet minimum standards of air quality within their own jurisdictions by continuing to create more severe penalties for states that fail to comply with minimum federal standards.[29]

Conversely, while federal statutes reflect the federal primacy in air quality protection, on occasion, the states have had to pressure the Environmental Protection Agency (EPA) to implement these laws properly. While each state has not pushed the EPA to act more stringently with respect to itself, states have had to generally push the EPA to enforce requirements that prohibit state implementation plans from causing significant failure of another state in meeting national air quality standards.[30]

What explains this behavior? Seemingly, with respect to states exceeding federal standards by imposing additional controls on sources in their own states, there is no incentive for them to do so. Higher standards would simply cost businesses in the state more money, and the federal standards presumably provide sufficient protection. However, there

27. *Id.* at § 7410 (a)(2)(D)(i)(I).
28. *Id.* at § 7543.
29. CRAIG JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 285 (2d ed. 2007).
30. *See* Appalachian Power Co. v. EPA, 249 F.3d 1032, 1038 (D.C. Cir. 2001) ("In August 1997, eight states submitted petitions requesting that the EPA find that stationary sources in upwind states contribute significantly to downwind air pollution").

would be an incentive to push the EPA to require other states to control air pollutants that cause the host state harm because those costs would fall out-of-state, and the benefits would fall in-state.

Through the lens of Glicksman and Levy, it would appear that, structurally, giving states the right to exceed federal standards in air quality does not create a collective action problem, i.e. there exists no situation in which states could improve the air quality in their own states at a cost to other states. Although increasing air quality provisions could act as a sort of tax on products manufactured in a state, which could then be borne nationwide, states own costs in lost industry and tax benefits, presumably, more than offset such a nation-borne cost. Indeed, the states would expectedly engage in a race to the bottom in air quality, which was one of the major justifications for the federal Clean Air Act and its minimum provisions in the first place.[31]

Still, states' attempts to induce the EPA to enforce existing minimum standards on other states' transport of criteria air pollutants provides us with an example in which states can improve their own air quality by increasing costs outside their boundaries. However, this does not amount to a "collective action problem" since it corrects distorted economic signals, instead of distorting correct ones. In the parlance of Glicksman and Levy, *not* enforcing environmental standards on the states that push costs beyond their borders would be a failure to correct a state's self-interested action that harmed others.[32]

The case of hazardous air pollutants is similarly illustrative. With respect to hazardous air pollutants, states are given the ability to provide for additional controls on the sources of these pollutants beyond federal requirements.[33] In this case, many states have exercised this grant of authority.[34] These states still face additional costs because they have regulated above the federal minimum standard,[35] but many state

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31. Whether or not a race to the bottom has occurred was the subject of many articles in the late 1990s, but it is interesting to note that if the states would have had an incentive to increase their states own environmental health quality by going above a federal minimum, they generally have not done that either. *See generally* Scott Saleska & Kirsten Engel, *"Facts Are Stubborn Things": An Empirical Reality Check in the Theoretical Debate on the Race to the Bottom in State Environmental Standard-setting*, 8 CORNELL J.L. & PUB. POL'Y 55 (1998).

32. In the CAA, other states are harmed if they face the costs of effective regulation but must share the pollution harms of states that choose not to exercise effective control.

33. *See, e.g.*, 42 U.S.C.§ 7416 (retention of state authority); *see also* Victor B. Flatt, *Gasping for Breath: The Administrative Flaws of Federal Hazardous Air Pollution Regulation and What We Can Learn From the States*, 34 ECOLOGY L.Q. 107 (2007).

34. Flatt, *supra* note 33, at 123.

35. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants From Petroleum Refineries, 72 Fed. Reg. 50,716, 50,726 (proposed Sept. 4, 2007) (discussion

governments also receive a benefit in the form of citizens' improved health quality.[36]

What accounts for the difference between transport of criteria air pollutants and hazardous air pollutants? It appears that, unlike the situation for criteria air pollutants, there is serious concern that the federal government has not successfully protected citizens with respect to hazardous air pollutants.[37] Therefore, states have continued with their own hazardous air pollution regulation and moved to issue their own controls to protect their citizens, even though the costs are primarily borne within the state itself.[38] Notwithstanding, it seems that the need for states to protect their own citizens is not enough to spur some states to tackle hazardous air pollutant health problems, demonstrating again the incentive for some states to "race to the bottom."[39]

In summary, since the passage of the Clean Air Act in the 1970s, states have not exercised their prerogatives to regulate beyond control standards required to meet the minimum national ambient air quality standards but, rather, have exercised their prerogative to exceed federal standards with respect to hazardous air pollutants. States have also acted to force the federal government to meet the federally mandated standards regarding air pollution transport, which was designed to avoid commons actions problems.

IV. GOING BEYOND FEDERAL STANDARDS UNDER THE CLEAN WATER ACT

The Clean Water Act created a shared federalism program structure very similar to the Clean Air Act. It has provisions that require specific performance standards as well as provisions that require the states to maintain a water quality level through point-source controls.[40] The

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of costs of benzene control mechanisms in petroleum refineries, which were rejected by the EPA in its proposed residual risk rulemaking for petroleum refineries in 2007).

36. Flatt, *supra* note 33, at 123-24 (describing California's two health based air toxics standards).

37. *Id.* at 121-22.

38. *Id.*

39. *See, e.g.*, Andrea L. Clements et al., THE CONTROL OF AIR TOXICS: TOXICOLOGY MOTIVATION AND HOUSTON IMPLICATIONS, FINAL REPORT 2-3 (2006) (discussing pollution conditions and controls in Houston) (on file with the author) *available at* http://hydrology.rice.edu/ceve/fraser/FINAL %20MASTER.pdf.

40. Clean Water Act, 33 U.S.C. §§ 1311–13 (2009). A "point source" is defined as "any discernible, confined, and discrete conveyance." *Id.* at § 1362(14).

Clean Water and Clean Air Acts differ mostly in that the Clean Water Act originally focused more on the point-source controls, whereas the Clean Air Act envisioned air quality through state work in the state-implementation plans.[41]

Nevertheless, the Clean Water Act also grants states the right to exceed federal standards—in language almost identical to that in the Clean Air Act[42]—and, through the joint federalism program, some leeway in reaching water quality standards.[43] Additionally, under the Clean Water Act, states even have some flexibility regarding how stringently they may regulate water quality standards for specific waterways, which digresses from the Clean Air Act's uniform requirements.[44]

The experience of the states with respect to the Clean Water Act has been very similar to their experiences with the Clean Air Act. The major problem has been getting the states to meet the minimum standards.[45] This is consistent with the theory that requiring applicants within a state to attain higher standards would be costly to the state, so the state would have no incentive to engage in such behavior. Again, like the Clean Air Act, the Clean Water Act was designed to discourage states from engaging in the expected behavior that they would attempt to lower standards in order to attract business.[46]

However, the Clean Water Act does require all federal permit applicants to certify that the granting of a permit will not violate state water quality standards.[47] The history of this statutory-certification section supports the idea that states may use it to protect their own interests against other interests. In 1995, the Supreme Court ruled that the Clean Water Act's 401 certification program allowed states to condition Federal Energy Regulatory Commission (FERC) licensing of hydroelectric facilities.[48] Since that time, courts have allowed states to successfully use 401

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41. JOHNSTON ET AL., *supra* note 29, at 139.

42. 33 U.S.C. § 1370.

43. Though states have flexibility in how they will reach water quality standards, the Clean Water Act is more specific about procedural requirements. The Clean Water Act anticipates effectuating the water quality standards through a specific method known as Total Maximum Daily Load (or TMDL). 33 U.S.C. § 1313(d). For an example of state flexibility in determining how best to meet water quality standards for impaired waters, see Pronsolino v. Nastri, 291 F.3d 1123 (9th. Cir. 2002).

44. 33 U.S.C. § 1313(c).

45. JOHNSTON ET AL, *supra* note 29, at 138.

46. *See* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1025 (D.C. Cir. 1978) (discussing Congress's insistence of establishing uniform standards across each industry).

47. This provision is otherwise known as "401 certification." 33 U.S.C. § 1341.

48. *See, e.g.*, PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700 (1994).

certifications to stop or modify hydroelectric projects.[49] This fits with Glicksman and Levy's collective action theory, as protection of a state's waters benefits those within the state, but the cost of losing hydroelectric power may reach beyond it.

The case of *Arkansas v. Oklahoma* provides another example of states attempting to engage in collective action behavior.[50] In this case, the State of Oklahoma challenged the EPA's grant of a National Pollutant Discharge Elimination System (NPDES) permit to the city of Fayetteville, Arkansas for a publicly-owned treatment work.[51] Oklahoma claimed that the discharges that would flow into Oklahoma added pollution to an already-impaired water body.[52] The Supreme Court ruled that, while the EPA had to preserve Oklahoma's water quality, the amount of pollutant added to the Oklahoma water body was *de minimis*.[53] Although the State of Oklahoma lost the case, the facts illustrate how states might freely try to impose costs on other states, even for relatively small in-state benefits.

V. LESSONS FROM HISTORY

The aforementioned air and water examples generally indicate that states do not exercise their prerogative to regulate above federal pollution standards. The reasoning behind this seems obvious: in most cases, the costs borne by exceeding federal standards fall within the state in the form of higher operating costs, job-loss, and taxes. In such cases, states have no incentive to exceed the federal standard, and, therefore, they do not. Where states have extended regulations—for instance, with air toxics, they were willing to bear the burdens because internal benefits exceeded the costs. Neither situation presented a collective action problem because states were unable to impose costs of increased regulation to outside jurisdictions. Thus, when states have an opportunity to exceed federal standards, and when states exercising that right bear the costs of so doing, no reason supports preemption. Indeed, states must retain that ability in order to protect the health and welfare of their citizens.

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49. Peter Henner, *Rapanos and Warren—A Tale of Two Cases: The Supreme Court Bats .500*, 12 ALB. L. ENVTL. OUTLOOK J. 52, 86 (2007).
50. Arkansas v. Oklahoma, 503 U.S. 91 (1992).
51. *Id.* at 95.
52. *Id.* at 97.
53. *Id.* at 113-14.

Likewise, most attempts by states to assist their citizens where the costs fall outside the state cannot be seen as a collective action problem. The Clean Air and Clean Water Acts include legislative provisions for states to try and control pollution in other states that cross in-state boundaries. Though these controls impose costs to outside states, such costs belong to the outside states in the first instance.

When a pollution-receiving state seeks for pollution-producing states to control pollution that crosses state boundaries, the pollution-receiving state does create benefits for its citizens and a cost in the pollution-producing state; but generally, the pollution-receiving state is only correcting the pollution-creating state's attempt to impose costs on it. There may arise a situation in which a pollution-receiving state is seeking to impose a large cost or additional burden beyond the safe and fair level in another state, such as what can occur in a 401-certification context or in other water quality contexts. Though some economic arguments claim that these two situations are identical,[54] common law recognizes the distinction of which party is lawfully entitled to a benefit and emphasizes that costs and benefits should be internalized (considered by) the decision-making party creating them.[55] Thus, when the law prevents a "race to the bottom," as the former example sets forth, it creates an economically aligned decision consistent with the common law, whereas the latter example produces the opposite result.

In essence, when a state fails to control its own sources that harm other states, it is the result of a real collective action problem, and law that prevents this, such as sections 110 and 126 of the Clean Air Act, should be enforced. Therefore, we should encourage any states that attempts to induce the EPA to control an outside state's air pollution that causes the state to exceed its NAAQSs, particularly since this would directly address the collective action problem.

In a situation such as *Arkansas v. Oklahoma*, in which one state tried to impose costs that it would not have imposed on itself upon another state disproportionate to the benefits, the law did not allow that imposition to occur. The court reasoned that state water quality objections had to be reasonable, which is also consistent with the common law.[56] In other words, the current structure of the federal water pollution control laws that are designed to prevent outside states from exporting pollution also precludes an affected state from overreaching on pollution control.

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54. Daniel A. Farber, *Parody Lost, Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 401 (1997).

55. Victor B. Flatt, *He Should at His Peril Keep It There: How the Common Law Tells Us that Risk-Based Corrective Action is Wrong*, 76 NOTRE DAME L. REV. 341, 358 (2001).

56. *Arkansas*, 503 U.S. at 104.

Section 401 certifications do seem to present collective-action-problem opportunities. No similar certification provisions exist in the Clean Air Act, though the Clean Air Act also prohibits federal agencies from taking actions that would harm a state's air quality.[57] This distinction may explain how and when preemption may be necessary, which seems to turn on the issue of whether the federal government's decision-making involves strong deference to states. In the case of the Clean Air Act, though the federal law does not allow a state to cause problems with another state's air quality (as in interstate pollutant transport), the state is not the final arbiter of whether such a problem occurs. Sections 110 and 126 of the CAA, which address interstate air pollution spillover, vest the determination of cause and effect within the EPA. This is similar to the EPA's ultimate control on recognizing out of state water quality impacts under Section 402 of the CWA in the *Arkansas v. Oklahoma* case. With respect to 401 certification, the states themselves are the final arbiters, and their decisions are not necessarily tempered with the reasonableness standard that the EPA supplied in *Arkansas v. Oklahoma*. Thus, allowing a state to set and maintain high standards, even when costs fall outside of that state, appears less problematic than failing to provide an effective review or reasonableness standard to go along with it.

One situation in environmental legal history in which a state exceeded federal standards that imposed a significant cost outside of that state (that is, not for the correction of an external benefit), is the Clean Air Act waiver provision, which permits California to exceed federal standards in mobile source design. Republicans in Congress have argued that such a policy imposes substantial costs outside of California.[58] However, it seems that significant costs also fall within California—primarily in the form of higher automobile prices because auto manufacturers also have the ability to shift much of costs external to California back to California.[59]

Does this mean that states should even be allowed to exceed federal product standards? Since even strong environmentalists acknowledge the possibility that multiple standards may present too high of a cost to

57. Clean Air Act, 42 U.S.C. § 7418 (2009).

58. A particular example used is Michigan because of the job losses already occurring there in the automobile industry. *See* quote from Representative John Boehner, Jan. 26, 2009, *available at* http://republicanleader.house.gov/blog/?p=413 (last visited Aug. 3, 2009).

59. Carlson, *supra* note 9, at 67.

business and ultimately the consumer, this is an important question. No clear-cut answer exists, drawing from environmental history. Certainly, many other states have adopted the California automobile standards, as permitted by the Clean Air Act, but since the Act does not permit multiple state-formulated automobile standards, we do not know what states would have opted for had more choices been available.

Even absent empirical proof, I suggest that it would have been unlikely for states to adopt standards beyond the federal or California paradigms, primarily because the in-state costs of adopting in state specific standards would serve as an incentive to avoid this action. California has a huge automobile market. Through its own standard, California raises the price of cars, but because of its large market, the prices are not so large per car, and that cost is apparently offset by the benefit that California receives in lower air pollution from mobile sources. It is almost impossible to imagine Vermont, or even Iowa, doing the same thing. Even if they had air pollution problems as extensive as California's, a unique market in either of these two states would be exceedingly expensive. For instance, in the case of a state like Vermont, the market might be so small that unique standards would force all product providers to pull out of the market completely. These smaller-market states, however, can piggyback on California's standard because products are already produced for the California market.

As far as appliance standards are concerned, only a few states have attempted to impose regulatory standards above the federal minimum, even in the face of federal inaction.[60] And there is evidence from the historic pattern of state action and federal response that any action that states did take relative to appliance regulation may only have been for the sole purpose of pressuring the federal government to adopt a standard.[61]

A similar analogy can be drawn from state regulation of insurance providers. As the costs of insuring coastal states have increased, insurers have indicated that they may pull out of markets completely if the states prevent them from recouping costs associated with coastal storms, and small states are the most vulnerable to that economic threat.[62]

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60. *Id*. at 65-66.

61. *Id*.

62. Christopher Swope, *State and Insurers Collide. What Happens when Gulf Coast states and Insurers Collide*, GOVERNING MAGAZINE, *available at* http://www.Insurancenewsnet.com/article.asp?neid=20070218125.18_8f6e012f90943e40 (last visited Aug. 3, 2009); *State Farm to pull out of Florida homeowner's market*, PANTAGRAPH.COM, *available at* http://www.pantagraph.com/articles/2009/01/28/money/doc497f404d0656c167076662.txt (last visited Aug. 3, 2009).

Before the modern Clean Air Act, when air pollution was traditionally a state concern, only one state—California—had attempted to regulate automobile product standards. This indicates once more the unlikelihood of a state adopting a unique product standard to control pollution, and, even so, any adoption would only likely occur where both the need was great and a market could be supported. This suggests that, despite rhetoric, in terms of product standards and environmental harm, we should generally allow states to exceed federal standards since the evidence supports that states will only do so where the need is great, and, in such circumstances, costs can generally be put back on states that do so. Certainly, a real collective action problem, as defined by Glicksman and Levy, does not seem present in such a situation.

VI. APPLICATION TO CLIMATE CHANGE POLICIES

What does all of this tell us about preemption of state and local climate change policies? The obvious parallel between climate-change-driven fuel-economy standards and the California Clean Air Act waiver provision indicates that the federal government should not preempt state fuel standard-setting. It is hard to imagine that a state would embark on higher fuel efficiency standards on its own, unless the need to do so was great. The costs inside the state—from higher auto prices to, possibly, the unavailability of the product—would ensure that this would occur only in unusual circumstances. California clearly receives co-benefits in other pollution reduction (that is severe in California), which makes this step a logical one for that state because the benefits outweigh the costs of adopting a unique product standard to control pollution.

What about cap-and-trade? Cap-and-trade programs seem mostly analogous to criteria pollutant controls through state implementation plans—an area in which the states have not taken aggressive action. Rather, the federal government has had to force states to meet minimum standards. Before the modern Clean Air Act in 1970, only California had serious state environmental controls, and it has not exceeded the federal criteria standards since that time; indeed, California has had trouble meeting them.[63]

One could expect the same consequence of cap-and-trade schemes. If a federal system is in place and working, a state would have negative

63. Only Los Angeles was classified as an extreme non-attainment area in the 1990 amendments to the CAA. Clean Air Act, 42 U.S.C. § 7511 (2009).

incentives to run its own program. For a state to run its own program would increase costs on sources that conduct in-state business with very few commensurate benefits since the benefits would be global. Compare this model with the controls on hazardous air pollutants, where states have been active and benefits accrue locally.

Though many states have joined some regional greenhouse gas cap-and-trade control regimes, only California seems to have a serious economy-wide cap that could be compared with a stringent federal system. Again, this model is similar to the type that existed before the modern Clean Air Act, and it is probable that, even without official preemption, states would not undertake a cap-and-trade program unless the federal program were ineffective.

The one plausible exception to this would occur if states became wedded to money that could come their way if they sold emissions allocations. In the current budget climate, these monies could provide an easy way for states to generate funds without increasing taxes. This situation could result in a collective action problem, but here, once more, we do not have enough information. If such fees were recognized as a tax, and if only in-state sources could be brought under an additional state cap, then it is still likely that a state would not do so due to the in-state costs of lost business and higher consumer prices.

VII. CONCLUSION

We cannot predict with certainty how states would act if the federal government granted them the power to add additional climate-change requirements on businesses in their states. However, from our history with other environmental laws, it appears that very little danger of a state exceeding a federal pollution control exists, unless the state believed that such an additional requirement were necessary to protect the health of its own citizens. Very few opportunities in environmental law permit collective action problems—where a state acts to benefit its citizens while imposing costs outside of the state. This may be true even with products, which we have generally assumed should fall under one national standard. Major climate-change policies seem no different from prior environmental laws, indicating that states would act similarly with respect to additional climate-change controls.

Generally, given that federal law should only preempt state law when it serves a particularly important purpose, preemption in the climate-change arena is uncalled for. However, some exceptions to this principle do exist, including considerations of unilateral state health criteria and, possibly, receiving monies from cap-and-trade auctions, but these exceptions are small. Overall, environmental law history suggests and

supports avoiding preemption in the climate law realm. States will rarely use their power to create unique regulatory schemes, and when they do, they only do so when it is necessary to protect the health and well-being of their citizens—a state's most important role.